IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 332

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JOHN H. JACKSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES J. BLOCH,
Division Counsel,
Southern Railway Company,
P. O. Box 176,
Macon, Georgia,
Attorney for Petitioner.

Of Counsel:
EDGAR A. NEELY, JR.,
Assistant Division Counsel,
1240 Bank of Georgia Building,
Southern Railway Company,
Atlanta 3, Georgia.

F. L. MENDENHALL, INC., 1908 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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Southern Railway Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above styled case on April 4, 1963.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, overruling Jackson's motion for new trial (R. 692-694) is unreported.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 712-721) is reported at 317 F.2d 532 (C.A. 5th 1963).

The opinion of the United States Court of Appeals for the Fifth Circuit denying the petition for re-hearing (R. 749, 750) is reported at 317 F.2d 532, 537 (C.A. 5th 1963).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on April 4, 1963 (R. 712-721), and a copy thereof is appended to this petition in the Appendix at pages A1 to A10.

The petition of the Southern Railway Company for a rehearing was denied on June 7, 1963 (R. 749, 750), and a copy of the opinion thereof is appended to this petition in the Appendix at pages A11 to A13.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

The trial court included within its charge to the jury certain instructions on the issue of contributory (comparative) negligence. The U.S. Court of Appeals of the Fifth Circuit reversed, holding that it was erroneous to submit to the jury questions of contributory (comparative) negligence. Thus, the questions presented are:

(1) Whether the appellate court was erroneous in holding as a matter of law that the question of contributory (comparative) negligence should not be submitted to the jury.

(2) Whether the Southern Railway Co. has been deprived of the right to a jury trial on the question of contributory (comparative) negligence.

(3) Whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

(4) Whether a jury can ever be authorized to consider whether a U. S. Railway mail clerk, in the exercise of ordinary care for his own protection, has any duty to stop or attempt to stop a run-away train by throwing on the emergency brake system.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Seventh Amendment, Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Georgia Code, Section 94-703: "Consent or negligence of person injured as defense; comparative negligence as effecting amount of recovery. No person shall recover damages from a railroad company for injury to himself or to his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him."

Georgia Code, Section 105-603: "Diligence of plaintiff. If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in someway have contributed to the injury sustained."

STATEMENT OF FACTS

On December 22, 1959, Southern Railway Company's Passenger Train No. 1 was proceeding in a southerly direction and approaching Mableton, Georgia. One of the cars on Train No. 1 was a "mail car" which Southern Railway Company was required by law to transport (39 U.S.C. 541; R. 39, Stipulation in Pre-trial Order).

Riding in the mail car as employees of the United States Government were three Railway Postal Clerks (Jackson, Gardner, and Billingsley), and one Railway Postal Supervisor (McClure). As Train No. 1 was approaching Mableton, Georgia, signal No. 39 (located 974 feet from the point of collision; plaintiff's exhibit No. 13) displayed a red board. The Southern Railway Company engineer failed to heed the "stop" warning of the red board, and Train No. 1 proceeded to crash head-on into Southern Railway Company Freight Train No. 86, allegedly causing injuries to the occupants of the mail car. Each of the occupants of the mail car, and Mrs. McClure, sued Southern Railway Company for the aggregate sum of Four Hundred Sixty-eight Thousand Eight Hundred Fifty-one Dollars and Seventy-seven Cents ($468,851.77). The basis for jurisdiction in the court of first instance was 28 U.S.C.A., Section 1332. The cases were consolidated for trial (R. 37, Pre-trial Order).

A. Indulging Inferences Which Permit the Upholding of the Trial Judge's Action.

The evidence, construed most favorably to uphold the trial court, was as follows:

As Train No. 1 was approaching the red board, Billingsley (one of the occupants of the mail car) observed that the lights were red (R. 221). Billingsley made this observation when he was 1,400 feet from the collision point,[1] and 30 seconds before collision time.[2] Because of his past experience and training, Billingsley immediately yelled out: "He's running those red lights." "I don't believe he can stop at the red light. The lights are red and I don't believe he can stop at the red light." (R. 223).

Jackson, an experienced railroad man with approximately ten years service as a railway employee, considered himself a "smart railroad man," even though he was temporarily a mail clerk at the time of the collision (R. 140, 141). Jackson knew the railroad was on Centralized Train Control, and that because of such control, trains sometimes go northbound on tracks which were, in the old days, considered strictly southbound tracks (R. 160, 161). Furthermore, Jackson knew that a red board means stop, and that it doesn't make any difference even if the train is on a so-called double track (R. 160, 161).

In spite of this knowledge that Jackson had acquired through approximately ten years of railroad experience,

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1. "A. We were going around the curve when I saw those lights. . . . Q. And you estimate that you were about twelve hundred feet? A. Twelve to fourteen hundred feet, yes, sir." (R. 221).

2. Although Billingsley stated that he first saw the lights "maybe twenty seconds" before accident time (R. 223), Jackson stated that Billingsley's first warning about the red board was given "thirty seconds prior to the accident" (R. 141, 142).

Jackson responded to Billingsley's first warning, saying: "You crazy idiot, it's double track." (R. 141). Then approximately fifteen seconds before collision time, Billingsley responded to Jackson with a second warning, stating: "No, he's on the same track, watch out, they are going to hit." (R. 141, 142).

Billingsley admitted that when he first saw the red board, he was six feet from the emergency cord[3] which, when pulled, automatically stops the train (R. 222). An examination of plaintiff's exhibit 14 shows that Jackson was approximately three feet from Billingsley.

When examined by the Court, Billingsley again admitted that pulling the emergency cord automatically stops the train (R. 229). Furthermore, the Court examined Billingsley concerning the location of this emergency cord by asking, and obviously pointing simultaneously to an exhibit within the observation of the jury: "Q. Is that the cord up there? A. Yes, sir." (R. 229). The only exhibit to which the trial court could logically have been pointing was plaintiff's exhibit 14. The mail car appearing at the top of the picture has several lines running the entire length of the car, and the court was probably referring to one of said lines.

Thus, the location of the emergency cord (which actually ran the entire length of the mail car) and the actual position of Jackson (see plaintiff's exhibit 14) in relation to said emergency cord, during the series of events prior to and after the collision, were exhibited and made known to

3. "Q. . . . now, how far were you away at the time you observed the lights were red from the cord that you pull that actually puts the emergency brakes on on that train? A. The cord is approximately six to eight feet from me, from where I was." (R. 222)

the members of the jury. Jackson, an experienced railroad man, was in a position to pull the emergency cord.

An inspection of plaintiff's exhibit 14 discloses Jackson's location in relation to the doors and windows of the mail car. Jackson, an experienced railroad man, was in a position to look out of said doors and windows when first warned by Billingsley in order to determine whether Train No. 1 was running a red board.

Estimates concerning the speed of Train No. 1 ranged from "I just don't know" (Jackson, R. 143), "40 to 45 miles per hour" "some eight seconds before" the collision (McClure, R. 124), and "35 miles per hour" at impact (McClure, R. 125). However, even at a speed of 45 miles per hour, Train No. 1 could have stopped, or the crash impact could have been diminished, if Jackson (the experienced railroad man) had pulled the emergency cord (R. 556 *et seq.*).

Dr. Rice, upon examining Jackson on December 22 and December 24, 1959 (the day of the accident and two days later) "didn't think he'd lose any time from work" (R. 515 *et seq.*). Under this evidence, Jackson lost no compensable time as a result of the December 22, 1959, collision. Even if Jackson is given the benefit of the doubt under defendant's evidence, Jackson lost one day's wage or a total loss of salary and wages of Thirty ($30.00) Dollars.[4]

Jackson swore, among other things, that the December 22, 1959, collision caused injuries to his back and left

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4. Dr. Turk, a witness for Jackson, testified that he "dismissed" Jackson "from treatment" on January 25, 1960, and at that time Dr. Turk "thought he was ready to return to work" as of January 27, 1960 (R. 351, 352). Under this plaintiff's evidence, a jury would have been authorized to conclude that Jackson's total loss of salary and wages attributable to the December 22, 1959, collision amounted to less than $700.

shoulder (R. 133). Yet two days after the accident when Dr. Rice saw Jackson the second time, he was complaining not of the left shoulder and left arm, but rather of the right forearm and right shoulder (R. 515, 531, 532, 533). On December 29, 1959, Jackson reported to Dr. Turk, who was in no way connected with the railroad, and complained of both shoulders, including the right. Dr. Turk made X-rays of the left shoulder one week after the accident, and concluded that the X-rays showed no shoulder separation (R. 350). Dr. Walter Sale, at the request of Dr. Martin T. Myers, made X-rays of Jackson's left shoulder on February 6, 1960 (R. 435, 437), and concluded that Jackson had a normal left shoulder (R. 437). Also, Dr. Wood Lovell, a physician for the National Postal Transportation Association of Portsmouth, New Hampshire, concluded that Jackson's left shoulder was normal (R. 378, 381).

On the basis of the X-rays taken by Dr. Sale on February 6, 1960, Dr. Myers concluded that Jackson's left shoulder required a wiring operation (R. 600, 601). Such operation was performed in December, 1960, notwithstanding that Doctors Turk, Lovell and Sale all felt that pre-operative X-rays revealed a normal shoulder. Under all the evidence, this shoulder operation was unnecessary, and any medical expenses connected with such operation were uncollectible.

The trial of the consolidated cases resulted in verdicts as follows: Jackson—$2,500.00 (R. 683); Gardner—$1,000.00 (R. 684); Billingsley—$1,500.00 (R. 684); McClure—$15,000 (R. 683); and Mrs. McClure—$750.00 (R. 683). Thus, the aggregate verdicts were $20,750.00, or considerably less than 5% of the sums sought.

B. Statement of Germane Facts by the Trial Judge.

Only Jackson moved for a new trial (R. 686-691). One of the major issues raised in Jackson's motion for new

trial was whether the court was correct in charging the jury on the subject of contributory (comparative) negligence.

The trial judge, who heard the entire case, found some evidence of contributory negligence on the part of Jackson, and answered the principal contention of Jackson in denying his motion for new trial (R. 692-694), as follows:

> "The Court does not see any merit in the contentions of the plaintiff, and, therefore, denies his motion for a new trial. The principal reason why plaintiff contends that he is entitled to a new trial appears to be the charge of the Court in regard to contributory negligence and the failure of the Court to direct a verdict as to liability. In that regard, it appears that definite factual matters existed which would preclude the rendering of a decision based on a question of law alone. The plaintiff had had a great deal of experience as a fireman by his own admission. His own testimony is to the effect that some thirty seconds before the collision he heard Mr. Billingsley's report that the engineer was running a red board, and that some fifteen seconds before the accident he heard Billingsley say that a collision was imminent. Everyone testified that the cord which would have put the brakes into emergency was not pulled." It seems to the Court that this most certainly presents a factual issue in that the jury was authorized to find that the cord should have been pulled as long as thirty seconds before the accident took place. Since this situation then was obviously present: the question of whether certain judgment should have been exercised in light of prevailing circumstances is for the triers of the facts, and most conclusively negates the plaintiff's contention that only a question of law was involved.
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> "The other grounds upon which plaintiff seeks a new trial will not be discussed in this order. Suffice it to say that the Court does not consider any of them to be sufficient and, therefore, hereby denies the motion."

C. The Appellate Court's Decision.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed, and ordered the cause remanded for a new trial (R. 712-721). The appellate court held substantially as follows:

(1) As a matter of law, under the law of Georgia, there are absolutely no circumstances which would ever authorize a jury to find that a U. S. Railway mail clerk, in the exercise of ordinary care for his own protection, has any duty to stop or to attempt to stop a run-away train by throwing on the emergency brake system; and

(2) As a matter of law, under the law of Georgia, the circumstances shown by the evidence in the instant case conclusively demonstrate that Jackson was in no way and to no degree, negligent; and

(3) Hence a charge which permitted a jury to find from the evidence (or to find to the contrary) that Jackson was negligent and that his negligence contributed, however slightly, to his injury, was under Georgia law reversible error; and

(4) That without question, Jackson occupied the status of a passenger. (Southern Railway Co. has always contended that a mail clerk under the law of Georgia does not occupy the same status as ordinary passengers and is not owed extraordinary care, and has also always contended that for purposes of this case the duty of care owing to Jackson by the railway neither increased nor diminished the duty of care owing by Jackson for his own protection.)

The petition by the Southern Railway Co. for a rehearing was denied (R. 749, 750). The appellate court, after admitting that Jackson had been warned, reasserted its position that as a matter of law, the jury was not au-

thorized to consider whether Jackson was in any degree negligent, however slight that negligence may have been.

WHY THE WRIT SHOULD BE GRANTED

The writ should be granted because the appellate court, in rendering its decision and judgment of April 4, 1963, has pre-empted the jury's function in determining whether Jackson was in any degree negligent, however slight that negligence may have been. Thus, the spirit and intent of the seventh amendment to the United States Constitution have been violated.

The seventh amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

In reviewing the judgment of the U. S. District Court, the appellate court necessarily re-examined the testimony of the witnesses, weighed the conflicting evidence, and held that the issue of contributory (comparative) negligence should not have been submitted to the jury. This appellate decision is still another continuation of "the gradual process of judicial erosion which has worn away a major portion of the essential guarantee of the seventh amendment."

It is a well recognized prineiple that in determining whether an issue should be submitted to a jury, all reasonably possible inferences must be made in favor of the opposite party. Furthermore, the jury should be given

the opportunity to make reasonable inferences from facts which are proven in evidence and which have a reasonable tendency to sustain them.

A. The Georgia Law of Comparative Negligence.

The controlling substantive law of Georgia, insofar as it relates to the effect of the negligence of a plaintiff upon his right to recover at all, and if permitted to recover at all, upon the diminishment of damages to which he might otherwise be entitled, is as follows:

(1) No matter how negligent the defendant may have been, if the plaintiff in the exercise of ordinary care could have avoided the consequences to himself of the defendant's negligence, after the same was actually discovered, or in the exercise of ordinary care could have been discovered, such plaintiff is wholly barred of recovery.

(2) One who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the taking of such risk in and of itself amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages resulting from a hurt thus occasioned, although the same may be in part attributable to the latter's negligence.

(3) If the negligence of the plaintiff proximately contributing to his injury is equal to or greater than the negligence of the defendant proximately contributing to the plaintiff's injury, then no recovery is permitted.

(4) If the negligence of the plaintiff proximately contributing to his injury is less than the negligence of the defendant proximately contributing to the plaintiff's injury, plaintiff may recover but his recovery shall be diminished by the fact-finding body in proportion to the amount of negligence attributable to the plaintiff.

In connection with the principles of Georgia negligence law enunciated above, the attention of the court is invited to the following: Georgia Code Annotated, Sections 94-703 and 105-603; *Smith v. American Oil Company*, 77 Ga. App. 463, 49 S.E.2d 90; *City of Columbus v. Griggs*, 113 Ga. 597, 38 S.E. 953; *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E. 6.

B. The Appellate Court Pre-empted the Jury's Function on Issues Concerning the Emergency Cord.

The appellate court's decision and judgment rendered on April 4, 1963, has, in effect resulted in a directed verdict for Jackson on the issue of liability. Construing the evidence most favorable to uphold the verdict, there was ample evidence of Jackson's contributory negligence and sufficient evidence to warrant the court's charge to the jury on the subject of contributory negligence.

In rendering its decision and judgment of April 4, 1963, the appellate court was laboring under the mis-apprehension that the emergency cord was located at some fixed point in the mail car. The fact of the matter is that the emergency cord ran the entire length of the car, including the entire length of that half of the car occupied by the mail clerks.

The trial court itself pinned down the exact location of this emergency cord by asking Billingsley: "Q. Is that the cord up there? A. Yes, sir" (R. 229). It is perfectly obvious from this question that the trial court was referring to one of the Exhibits, and pointing out some line which in the Court's conception, represented the emergency cord.

The only Exhibit to which the trial Court could logically have been pointing was plaintiff's exhibit 14. An examination of exhibit 14 discloses that the diagram of a

mail car appearing in the top part of said Exhibit contains several lines which run the entire length of the car. Since the emergency cord did in fact run the entire length of the mail car, the trial judge was undoubtedly pointing to one of said lines.

Furthermore, whatever line the trial court did point out, the pointing was done before the members of the jury. It was so obvious the emergency cord ran the entire length of the car that tying it down conclusively was not deemed necessary.

The appellate court was also laboring under the misapprehension that Jackson's position in relation to the emergency cord was unknown. Not only did the trial court point out the location of the emergency cord (R. 229), but a quick glance at plaintiff's exhibit 14 will demonstrate the fallacy in this construction of the evidence. All of the occupants of the mail car placed their initials on plaintiff's exhibit 14, indicating the position of each both before and after the collision. Thus, the position of Jackson in relation to the emergency cord was clearly available to the members of the jury, and the jury had the right to consider whether Jackson was in a position to pull the cord.

Jackson himself was a railroad man of many years' experience. With such experience, Jackson shared the common knowledge among all experienced railroad men that each railroad car has an emergency cord which runs the entire length of each car, and which, when pulled, automatically stops the train. For what purpose was the emergency cord run through the mail car if not to be used by one of the occupants in an emergency, particularly by an experienced railroad fireman acting as a mail clerk, like Jackson?

C. The Appellate Court Pre-empted the Jury's Function in Determining Whether Jackson Knew, or in the Exercise of Ordinary Care Could Have Known, That a Collision Was Imminent.

In rendering its decision and judgment of April 4, 1963, the appellate court was laboring under the mis-apprehension that Jackson had no way to determine that a collision was imminent. Plaintiff's exhibit 14 reveals that there were three (3) windows and one (1) door on each side of the mail part of the combination mail and baggage car. There is nothing in the record to indicate that Jackson could not have seen the red board by looking out the window after Billingsley's first warning thirty seconds before the collision, and after Billingsley's second warning fifteen seconds before the collision. But in any event (whether Jackson had the ability or not to see out the window), the jury had the right to find from the facts:

(1) That Billingsley's warnings, both thirty seconds and fifteen seconds before collision time, were enough in and of themselves to cause Jackson to reach for the emergency cord—Jackson being an experienced railway fireman and it being obvious to him that something was gravely the matter; or

(2) That Billingsley's first warning was at least sufficient to cause Jackson to stop doing whatever he was doing and to proceed to the door to determine for himself whether the lights were in fact red. If Jackson had heeded the warning even to this extent, he could have easily been at the door when Billingsley gave the second warning fifteen seconds before collision time. Under the evidence, had he been at the door he could have observed that a collision was imminent and, being an experienced fireman, reached for the emergency cord.

D. General Considerations of Law.

Whether facts are sufficient to take a particular issue to the jury has been decided to be governed by Federal rather than State standards. See *Reiter* v. *Eastern Airlines, Inc.*, (C.A. 5th 1955) 226 F.2d 443; *Togue* v. *Great Atl. and Pac. Tea Co.*, (C.A. 5th 1957) 242 F.2d 575. But whatever the answer to this vexing problem, the following principles were overlooked by the appellate court:

(1) ". . . not only may an issue of fact arise from contradictory evidence, but contrary implications consistent with the testimony may arise from the proved facts; and in still other ways the question of what is true may remain an issue of fact despite uncontradicted evidence in regard thereto . . . in order to render any finding of fact demanded as a matter of law, not only must there be no controversy in the evidence material to the issue involved, but the implications and inferences which logically and properly arise from the evidence must necessarily lead to only one conclusion." *Liberty Mutual Insurance Company et al.* v. *Blackshear et al.*, 197 Ga. 334, 336, 28 S.E.2d 860.

(2) In arriving at a conclusion upon disputed issues of fact, a jury may believe a part of the testimony of a witness or witnesses and reject another part thereof. See *Pass* v. *Firestone Tire & Rubber Company*, (C.A. 5th 1957) 242 F.2d 914(3), and *Ocean Accident and Guaranty Corporation et al.* v. *Lane*, 64 Ga. App. 149, 12 S.E.2d 413.

(3) The testimony of a party as a witness in his own behalf is to be construed most strongly against him where the same is self-contradictory, vague or equivocal. See *Garrett* v. *Louisville and Nashville Co.*, 86 Ga. App. 806; 72 S.E.2d 550; *Roanoke City Mills, Inc.*, v. *Whelchel*, (C.A. 5th 1954) 208 F.2d 66 (2).

(4) The jury is the sole judge of the credibility of the witnesses and where it believes that one has testified falsely in any particular it has the right (though not the duty) to apply the maxim "falsus in uno, falsus in omnibus" and reject the testimony of such witness in its entirety. See *Banker's Health and Life Ins. Co.* v. *Nichols*, 44 Ga. App. 536, 162 S.E. 161 (2).

In rendering its decision and judgment of April 4, 1963, the appellate court has overlooked the following cases wherein it is recognized that the issue of negligence is a two-way street:

(1) "This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if negligence might justify a finding either way on those issues." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413.

(2) "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty is it to settle the dispute by choosing what means to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 744.

(3) "As we have pointed out, under the teaching of the recent decisions of the Supreme Court, the domain of the jury in circumstantial cases under the Federal Employers' Liability Act may not be narrowly bounded, and the settling of any question of negligence or proximate cause, where more than one rational possibility is involved on the evidentiary facts, is exclusively within its field. This is true for every purpose in the case, and, in according

the jury its inherent function, recognition of the right in one aspect or incident of a case is as important as in another." *Henwood* v. *Coburn*, 165 F.2d 418 (C.C.A. 8th 1948).

(Although the case now pending before this court is not an FELA case, the negligence principle set forth in the *Henwood* case, *supra*, is still applicable.)

(4) ". . . if there exists any evidence from which negligence might be fairly inferred, the question is one for the determination of the jury even though the jury's verdict involved some speculation and conjecture in regard to some of the links of the chain of reasoning by which the conclusion was resolved. . . . The rule should be applied equally to employees as well as employers." *Wilson* v. *Union Pac. R. Co.*, 231 P.2d 775 (Utah 1951).

(Although Jackson was not an "employee", the rules of negligence should nevertheless be equally applied to Jackson as well as to Southern Railway Company.)

The appellate court also overlooked, as it pre-empted the jury's function, the following language from the case of *Dixon* v. *Virginian Railway Company*, (C.A. 4th 1957) 250 F.2d 46, 462:

"That is not to say that there was not evidence amply sufficient to support a different conclusion, but as this court recently said in *Atlantic Coast Line R. Co.* v. *Truett*, 4 Cir., 249 F.2d 215, 217, 'Distilling the essential truth from a raw mixture of circumstances is the fact finders function, and the jury is the instrument our system provides for this purpose.' Courts are, and should be, astute not to substitute their judgment on issues of fact for that of the jury's when different inferences may be reasonably drawn from the evidence."

E. The Appellate Court Has Pre-empted the Jury's Function in Determining Whether Jackson Acted with Such Care As an Ordinarily Prudent Person Would Exercise.

In rendering its decision and judgment of April 4, 1963, the appellate court said: "The proposition that any person in the position of a passenger whether in a passenger car or in a mail car owes a duty to stop a run-away train by throwing on the emergency brake system is something that we cannot accept."

While this is not the place to argue that the duty with respect to a mail clerk is only due care (in this case there is no question but that Southern Railway Company was negligent) it is well to point out that the appellate court has become so entranced with the alleged sacrosanct position of a passenger that it has confused the heavy duty resting on a railroad toward a passenger with the duty resting upon the alleged passenger to exercise ordinary care for his own protection. The court seems to feel that because the railway is burdened with a heavy duty, this somehow counterbalances the duty resting upon the passenger and in effect, eliminates it. This court then has laid down the arbitrary rule that no person toward whom the railway owes a duty of extraordinary care, no matter whether he be an experienced railway man himself fully familiar with all the procedures and the functions of all of the men and instrumentalities, shall ever be deemed to be under an obligation to stop a train known by him to be a run-away train, even though the alternative may be his own death.

In deciding as a matter of law that there was absolutely no evidence of negligence on the part of Jackson, the appellate court misconstrued and misapplied the "emergency doctrine" of Georgia as contained in the case of *Everett v. Clegg*, 213 Ga. 168, 170, 97 S.E.2d 689, 691,

The *Everett* case, *supra*, held that a person confronted with a sudden peril not arising from any fault of his own, "will not be held negligent when he exercises the right to take care of himself in order to avoid injury, provided he acts with such care as an ordinarily prudent person would exercise."

The appellate court pre-empted the right and duty of the jury to determine whether as a matter of fact Jackson (an experienced railroad man), when confronted with a sudden peril not arising from any fault of his own, did act with such care as an ordinarily prudent person would exercise. Also, the appellate court neglected to recognize that the suddenness of the peril itself was one for jury determination.

One confronted with a sudden emergency, without having sufficient time to determine with certainty the best course to pursue, is not held to the same accuracy of judgment as would be required of him if he had time for deliberation. However, the arising of such an emergency does not relieve one from the obligation of exercising ordinary care, but is merely one of the circumstances which is proper for consideration in determining whether ordinary care has been exercised and the fulfillment or breach of such duty of ordinary care by the person so confronted with a sudden emergency is a jury question. *Napier* v. *DuBose*, 45 Ga. App. 661, 165 S.E. 773; *Clackler* v. *Barnwell*, 83 Ga. App. 515 (3), 64 S.E.2d 384 (3).

The Trial Judge, who heard all the evidence in this the Jackson case, concluded that the issue of contributory negligence on the part of Jackson was for the triers of fact. The Appellate Court, in deciding contrary thereto, has pre-empted the jury's function.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

CHARLES J. BLOCH,
Division Counsel,
Southern Railway Company,
P. O. Box 176,
Macon, Georgia,
Attorney for Petitioner.

Of Counsel:

EDGAR A. NEELY, JR.,
Assistant Division Counsel,
1240 Bank of Georgia Building,
Southern Railway Company,
Atlanta 3, Georgia.

CERTIFICATE

Copies mailed to opposing counsel as per Certificate of Service on file.